IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 641 OF 2006
IN
SUIT NO. 3214 OF 1996

Pearl Polymers Limited .. Plaintiffs.

V/s.

M/s.Raymond (India) Paint
Manufacturing Co.Pvt.Ltd. .. Defendants.

Mr.S.A.Ahmed i/by Thakker & Bali for the Plaintiffs.

Mr.Manoj Mhambre for the Defendants.

CORAM : S.A. BOBDE, J.

DATED : 27th NOVEMBER, 2006.

P.C.:

. Heard.

2. This notice of motion is taken out by the defendants under Order 9, Rule 13 of C.P.C. for setting aside the exparte decree passed by the learned single Judge of this Court in Suit No. 3214 of 1996.

3. A preliminary objection has been raised by the learned counsel for the plaintiffs regarding the maintainability of this notice of motion. It is submitted by the plaintiffs' counsel that the decree

passed by the learned single Judge of this court is under Order VIII, Rules 5 and 10 and not under Order IX of the Code of Civil Procedure. Therefore, according to the learned counsel for the Plaintiffs, the defendant is not entitled to invoke Order IX, Rule 13. It is further submitted that the defendants could have invoked Order IX, Rule 13 only if the learned trial Judge would have proceeded under Order IX, Rule 6 to make an order that the suit be heard exparte.

4. The facts of this case justify the submission of the learned counsel for the plaintiffs. Indeed, the learned single Judge did not make an order that the suit should proceed exparte when the defendant did not appear on 8th of June, 2004. The suit was decreed, having regard to the fact that no written statement had been filed and therefore, the facts stated in the plaint were accepted as correct. It is, therefore, clear that the decree is passed under Order VIII and not under Order IX. This being so, the judgment of the division bench of this court in notice of motion No. 2956 of 1995 - **Dhanwantrai R. Joshi & Ors. vs. Satish J.Dave & Ors.**, **1999 (1) BomCR-97**, squarely applies to the present case. The division bench has concluded in paragraph 15 that an application under Order IX, Rule 13 is not maintainable when the court has passed a decree under Order VIII,

Rule 5 or Rule 10 of the C.P.C..

5. In this view, the preliminary objection raised by the learned counsel for the plaintiffs is upheld. The notice of motion taken out under Order IX, Rule 13 is dismissed.

(S.A.BOBDE,J.)

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